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Issue date: 07Dec2001

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In The Matter Of :

RONALD K. EARL :

Claimant :

v. :

Case No: 2001-LHC-00066

OWCP No.: 6-165992

MORAN TOWING :

Employer :

and :

SIGNAL MUTUAL :

INDEMNITY ASSOCIATION :

Carrier :  
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### ORDER DENYING RECONSIDERATION

On October 1, 2001 I issued a *Decision and Order on Modification* in this case. In that decision, I found that Moran Towing ("Employer") was not entitled to modification of my earlier decision granting benefits to Ronald Earl ("Claimant"). On October 10, Employer filed a timely motion for reconsideration. It is within the judge's discretion to grant or deny a motion for reconsideration. *Winburn v. Jeffboat, Inc.*, 9 BRBS 363 (1978). For the following reasons, this motion for reconsideration is denied.

I initially issued a decision in this case awarding the Claimant compensation for permanent partial disability in December 1998, under Docket No. 96-LHC-237. Employer filed a request for modification in August 1999. Section 22 of the Act provides that a decision may be modified due to a change in condition or a mistake in a determination of fact. The standard for granting modification is whether the modification is appropriate to "render justice under the act." *Banks v. Chicago Grain Trimmers Assoc.*, 390 U.S. 459 (1968). The party requesting modification has the burden of proof in showing a change in condition. *Vasquez v. Continental Maritime*, 23 BRBS 428 (1990); *Winston v. Ingalls Shipbuilding*, 16 BRBS 168 (1984). Additionally, a judge may find a change in condition based on a change in the claimant's physical condition or a change in the claimant's economic condition alone. *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121 (1997).

Employer contends that “this Court too narrowly construed the basis for modification,” addressing modification based on a change in medical condition but not addressing modification based on a change in economic conditions alone (*Motion for Modification* at 1). Employer specifically asserts that I failed to consider two jobs as port engineers, which offer higher wages than it was previously determined Claimant could earn. Further, Employer requests that I reconsider rejecting Dr. Sury’s testimony as it relates to Claimant’s work restrictions. Claimant opposes the motion for reconsideration, stating that I rightly rejected Dr. Sury’s opinion, and that Employer’s vocational expert’s testimony rises and falls with Dr. Sury’s opinion because it is based on the doctor’s restrictions.

First, my *Decision and Order on Modification* clearly explained the grounds for my rejection of Dr. Sury’s opinion, and I will not address this issue further here. My decision also addressed the two port engineer jobs, which Employer offered to show that Claimant could perform his regular work. I explained that at the time of his injury Claimant did not work as a port engineer, but as an assistant port engineer, which is a different job with different physical requirements (ALJX 1, at 3). Additionally, although Claimant had worked as a port engineer in past years, he voluntarily resigned his post because he was unable to perform the physical demands of the job (ALJX 1, at 4, 5). Because I have found that Claimant’s physical condition has not improved, there is no basis to find that he can now perform the job of port engineer when he could not perform it previously. Additionally, Claimant testified at length at his November 1999 deposition that the job of port engineer required more physical activity than he could perform (EX 25, at 9-14). I explained in my *Decision and Order on Modification* that I accept Claimant’s testimony regarding his levels of pain. Therefore, Employer failed to show that Claimant had an increased wage-earning capacity through the two port engineer jobs.

In regard to Employer’s contention that I did not address modification on the basis of a change in economic conditions in my *Decision and Order on Modification*, Employer simply failed to raise a change in economic conditions as a basis for modification. In its *Counter-Petition for Modification*, Employer lists only two grounds for modification: (1) “[C]laimant has improved from a physical standpoint,” and (2) [C]laimant has improved and recovered from his injuries to the extent that he is capable of earning an amount in excess of the amount determined to be the wage earning capacity.” Both of these grounds are premised on Claimant’s physical improvement, and do not suggest that Claimant’s wage-earning capacity has improved due to a change in economic conditions. Additionally, nowhere in Employer’s *Post-Hearing Brief* on modification is modification based on change in economic conditions addressed. Rather, Employer repeatedly refers *only* to modification based on change in medical condition. In the brief’s section entitled “Law on Modification,” Employer states only that “[t]he statute provides for modification when there is a *change in the claimant’s physical condition* since the original award.” Employer’s *Post-Hearing Brief*, at 1 (emphasis added). In the section entitled “Modification is Warranted in this Case,” Employer writes one sentence:

In this case, modification is warranted as the evidence clearly shows that claimant's *medical condition has significantly improved* to the point he now has a greater earning capacity.

Employer's *Post-Hearing Brief*, at 2 (emphasis added). Employer then includes four pages of text under the heading "Claimant's Medical Condition Has Improved," followed by two pages arguing that "Mr. Albert demonstrated that claimant's earning capacity has been increased, if not completely restored, *based on Dr. Sury's new restrictions.*" Employer's *Post-Hearing Brief*, at 5-7 (emphasis added). Nowhere does Employer state that Mr. Albert's labor market surveys show increased wage-earning capacity based on economic rather than physical conditions. Thus, Employer clearly failed to raise a change in economic conditions as a basis for modification.

Accordingly, Employer's motion for reconsideration of the denial of modification is denied.

A  
JEFFREY TURECK  
Administrative Law Judge